

PRESSURES AND PRINCIPLES—THE POLITICS OF THE ANTIBOYCOTT LEGISLATION

Henry J. Steiner*

I. INTRODUCTION

Campaigns within Congress to curb the domestic reach of the Arab boycott of Israel go back over a decade. Such efforts became intense from 1975 to 1977, as petrodollars mounted and gave the boycott a new power. The advocates of legislation aroused a determined opposition within the executive branch and the business community. Hard battles followed between branches of government and between private interest groups. Eventually those battles gave way to innovative bargaining arrangements between the private interests, which produced acceptable compromises. Such compromises figure prominently in the antiboycott provisions of the Export Administration Amendments of 1977,¹ and the implementing regulations of the Commerce Department which became effective in January 1978.²

The legislative record is dotted with assertions of the singularly abrasive character of these battles. But the campaign for federal legislation was probably no rougher than those aiming at other contentious programs. The final votes were in fact overwhelming,³ and thus far the battles have left few casualties.

Still the three-year drive for strong checks on American participation in the boycott engages the interest of the political observer. It is upon these political phenomena rather than a systematic legal analysis of the statute that this Article dwells. I draw only selectively and illustratively upon the provisions of the 1977 amendments and 1978 regulations.

My observations about the politics of the antiboycott legislation concentrate upon three themes with a common element that speaks

* Professor of Law, Harvard University. B.A., 1951; M.A., LL.B., Harvard University, 1955.

¹ Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977) [hereinafter referred to as EAA] amending the Export Administration Act of 1969, 50 U.S.C. app. § 2401, *et seq.* (1970) (amended 1974).

² Export Administration Regulations on Restrictive Trade Practices or Boycotts [hereinafter cited as EAR], 43 Fed. Reg. 3508-37 (1978).

³ See note 77 *infra*.

to a salient contemporary feature of the political process. The shared element is the prominence of interest-group politics—that is, the degree to which the origin or fate of major legislative proposals depends upon well organized groups that are knowledgeable, effective and committed to (or committed to oppose) the proposal. Their decisions to fight or yield will strongly influence the timing and content (or collapse) of legislation. These private groups interact complexly with the White House, executive departments and the Congress, as well as each other. They may assume a quasi-official role in the formal political-legislative process through the respect and close attention shown them by the Executive and Congress. They may in fact be enlisted by one or another branch of government to find between themselves a solution. All such phenomena here occurred.

In the boycott context, the two dominant groups were three Jewish agencies—the Anti-Defamation League of B'nai B'rith, the American Jewish Committee, and the American Jewish Congress—which acted cooperatively in fighting for antiboycott legislation, and a variety of business associations—most prominently the Business Roundtable—which opposed or sought to weaken the anti-boycott bills. A third group, not directly before the Congress and of course not subject to any proposed regulation, also exerted a powerful influence on the final terms of the legislation—the Arab states whose boycott was under attack. Their cause and the justification for their boycott were argued principally by the business interests, just as the Jewish agencies spoke to concerns not only of the American Jewish community but also of Israel. Interest group politics here had a distinctive international flavor.

My first theme examines the arguments made before and within the Congress for and against legislation. Did different types of argument characterize the interest groups advocating or opposing strict legislation? Did these arguments exert a force independent of the force of the groups advancing them? That is, did they to some extent stand above their interest-group authors and play some autonomous role in influencing the outcome?

A second theme treats the changing position and role of the Executive after President Carter's election. What forces led to that change, and how did it influence the terms of the legislation? How did the executive branch respond to the threefold pressures upon it from business groups, the Jewish agencies and the Arab governments?

The final theme concerns the decisive, perhaps unique role, which the leading Jewish agencies and the Business Roundtable played in the final months. Does that role suggest a changing pattern for interest group conflict and accommodation over legislative measures? A closing section develops earlier observations while speculating about the effects of the legislation upon the boycott and our relations with Arab countries.

In developing these themes, I draw not only upon the official record of hearings and debates, to which most notes will refer, but also upon a more vivid and personal sense of the events of these years. My discussions with a number of executive officials, Congressmen and representatives of interest groups in 1976 and 1978 contributed to that sense, as did the rich periodical coverage of these events.

II. SOME BACKGROUND INFORMATION

A barebone description of draft bills and the final legislation will be useful to the later discussion. The 94th Congress debated two basic antiboycott bills in its second (1976) session. The Senate (Stevenson) bill⁴ tightened reporting requirements for business firms; prohibited the furnishing of information sought for purposes of boycott enforcement that concerned a person's religion, race or national origin; and prohibited the refusal by American firms to do business with other American firms because of requirements of foreign boycotts. It easily passed the Senate.

The House (Bingham-Rosenthal) bill⁵ was more severe. It covered the preceding ground but also imposed penalties on firms that took action "with intent to comply with or to further or support any trade boycott" fostered by a foreign country against a friendly foreign country. The prohibited action included the furnishing of *any* boycott-related information, as well as a refusal to do business with the boycotted country, its firms or American firms because of the boycott. The bill did not include the important exceptions and qualifications to these restrictions which became so vital a feature of the 1977 legislation. The 94th Congress ended after passage of the Senate and House bills but before differences between the two could be resolved.⁶

⁴ Title II of S. 3084, 94th Cong., 2d Sess. (1976).

⁵ Section 14 of H.R. 15377, 94th Cong., 2d Sess. (1976).

⁶ See note 57 *infra*.

The 1977 legislation, after broadly prohibiting action "with intent to comply" with foreign boycotts⁷—prohibitions covering much the same ground as those in the Bingham-Rosenthal bill—provides important exceptions. Two central exceptions figure in the following discussion: (1) compliance by a United States firm with the "unilateral" selection by the boycotting country or its nationals or residents (including subsidiaries of United States firms located there) of suppliers of services to be performed in the boycotting country, and of suppliers of specific goods normally identifiable by source (as if trade-marked) when imported into the boycotting country;⁸ and (2) compliance by subsidiaries of United States firms resident in a foreign country with the laws of that country with respect to a subsidiary's local activities, including laws governing the import of identifiable products for its own use.⁹ As interpreted by the regulations of the Commerce Department,¹⁰ these and related exceptions have the effect of permitting American corporations to continue to do business with Arab customers that to some degree is explicitly shaped by boycott rules. They have particular relevance to the large multinational companies, those engaged in subcontracting and owning foreign subsidiaries.

My comments on the legislation and its political setting treat only marginally the *primary* Arab boycott of Israel—that is, bans by Arab countries of trade with or investments in Israel. The primary boycott was barely touched by the new laws. The real battles were over the *secondary* boycott—that is, the effort of the Arabs to enlist third-country firms in the boycott of Israel by refusing to purchase goods or services from them if they engaged in proscribed commercial relations with Israel (and were therefore blacklisted). I include within this concept of secondary boycott, its extended form (sometimes referred to as a tertiary boycott): the refusal of Arab customers to purchase goods from a third-country firm acting consistently with the boycott if those goods include components made by a blacklisted firm.¹¹ The only third country figuring in my discussion is the United States.

⁷ EAA sec. 201, § 4A(a)(1).

⁸ EAA sec. 201, § 4A(a)(2)(C).

⁹ EAA sec. 201, § 4A(a)(2)(F).

¹⁰ EAR § 369.3, 43 Fed. Reg. 3525-34 (1978).

¹¹ In an earlier article, I described the anatomy of the Arab boycott and distinguished among its four basic forms with their different degrees of penetration of our domestic order: the core and extended primary boycott, and the core and extended secondary boycott. See

III. THE CONGRESSIONAL CONTEXT: PRESSURES, PRINCIPLES AND PREDICTIONS

The one-sided votes for antiboycott legislation in the 94th and 95th Congress have no simple explanation. That *some* measure would emerge became clear by mid-1976, partly because of a growing number of state antiboycott statutes.¹² The forces behind the state laws had sought in part to spur federal action. They succeeded. The confusing diversity of state laws and their interstate or foreign reach led to pressures for federal preemption and a uniform rule.

At the federal level, the organized and documented programs of the Jewish agencies played a vital role. One or another of these groups amassed, analyzed and distributed information about the boycott, argued for legislation in publications and in testimony before Congress, brought law suits, and exerted a continuing pressure on Congressmen, executive agencies and key multinational corporations.¹³

Behind such front-line agencies stood a Jewish population whose concern mounted over the secondary boycott's success. That success appeared to pose threats ranging from subtle and indirect forms of religious discrimination in corporate practices, to the imprinting upon the American economy of systematic discrimination against Israel. Concerns about the boycott reached Congress from these electoral constituencies as well as from the Jewish agencies. Such electoral politics played its role, although Senate and House support for the legislation was so geographically widespread as to discredit any explanation based dominantly on congressional response to concrete pressures of local Jewish groups.

Congress also felt powerful counterpressures, not only from business interests but from the Ford, and to a lesser degree, Carter Administrations. Corporate residents of congressional districts clearly influenced their representatives. Arab governments and Arab businesses made their views known to the Administration and to the multinational firms with which they dealt. Such views made their way to the Congress. But no more readily can the opposition

Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1367-69 (1976).

¹² See, e.g., Illinois Blacklist Trade Law §§ 1-6, ILL. ANN. STAT. ch. 29, §§ 91-96 (Smith-Hurd Supp. 1976-1977); Human Rights Law, N.Y. EXEC. LAW §§ 296, 298-a (McKinney Supp. 1975-1976).

¹³ See Maslow, *The Struggle Against the Arab Boycott*, MIDSTREAM, Aug./Sept. 1977, at 11.

to strict legislation be understood simply as a response to these polar forces.

The essential role of the private groups was to heighten awareness, inform legislators and the public about the historical experience with the boycott, predict the effects of new regulation, and advance arguments for or against legislation based on such facts or predictions. No doubt these arguments served an instrumental and ideological function. They captured the interests of the different groups in an objective, non-self-interested form. They were meant to generalize the grounds for the groups' claims on the legislature and thereby to attract support from broader constituencies.

But to note their ideological and self-interested character is to point only to one aspect of their role. The leading arguments before the Congress cannot be fused completely with the groups generating them, and thereby reduced to camouflaged group interests. They stood to an important degree on their own. Their link to traditional principles in American politics and to accepted national goals gave them independent claims for attention—a certain autonomy.

It is such arguments that I now examine. Broadly speaking, the arguments for or against strict legislation fall into two distinct patterns. The proponents of forceful action tended to argue from two general principles. One was basically moral in character—the principle of non-discrimination. The other expressed a basic political concept—the principle of territorial sovereignty. In contrast, the opponents of strict legislation tended to stress the likely negative effects of legislation upon economic life—export trade and related jobs, oil prices and the petrodollar holdings of government debt—as well as upon our influence for any Middle Eastern settlement.

The distinction here intended between the two types of argument is not solely between rights-based or “principled” arguments for antiboycott legislation, and instrumental or utilitarian arguments stressing the dangerous consequences of legislation for some welfare goal. The two sides did tend towards one or the other style of argument, but these were only tendencies. For example, advocates sought ways to lessen the risk that legislation would drive away Arab business; opponents sought to limit the foreign reach of any United States legislation by drawing on the principle of territorial sovereignty. Nor is the distinction solely between a stress on vindication of principle and stress on consequences. Both sides were attentive to consequences, whether those stemming from the surrender or compromise of a given principle or those stemming from legislation that might provoke retaliation.

Rather the root distinction that I here intend is between the different kinds of values or interests stressed in the arguments of the two sides. Through their two principles, proponents invoked traditional values that spoke to a moral sense or to basic political beliefs. Opponents stressed more tangible and material goals. Indeed, their focus upon material consequences proved in the end to be a major weakness in the bid to forestall legislation. The predictions were shaky, contentious and not widely believed.

A. *The Advocates of Strong Legislation*

It was politically strategic for proponents of legislation to stress arguments portraying the boycott as encouraging anti-Jewish discrimination by American business. To the extent accurate, that portrait assured governmental countermeasures. Business and other groups could hardly contest the need to curb domestic discrimination.¹⁴ This was common ground, partly covered by existing statutes and regulations.

Where opinion differed was over the accuracy of this view.¹⁵ To stress religious discrimination was to bypass the complex questions posed by other, unrelated secondary boycott practices. Instances of discrimination were rare.¹⁶ Of course, the boycott might have fos-

¹⁴ Numerous Congressmen commented on the issue of discrimination. See, e.g., the remarks of Senator Stevenson that the boycott "interferes with basic human rights and religious freedom." *Arab Boycott, Hearings to Amend and Extend the Export Administration Act Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as *1977 Senate Hearings*]. The spokesmen for business interests appearing before congressional committees took pains to recognize the need for legislation checking any trend towards religious discrimination in employment or the selection of business customers. See, e.g., *Hearings on Extension of the Export Administration Act of 1969 Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 130, 137 (1977) [hereinafter cited as *1977 House Hearings*]; *1977 Senate Hearings*, *supra*, at 101, 335. But, as indicated in note 15 *infra*, they found no such discriminatory intent in the boycott.

¹⁵ See, e.g., the statement of Robert McNeill, Executive Vice Chairman of the Emergency Committee for American Trade, which argued that legislation should "deal with foreign boycotts as they are and not as some describe them to be." The Arab boycott, he stated, involved not religious but political discrimination, and a trivial number of boycott-related requests involved religious discrimination. *1977 House Hearings*, *supra* note 14, at 137.

¹⁶ Some questionnaires and certifications reached beyond inquiry into an American firm's relations with Israel to inquiry into the identity of persons related to the firm, or personal information about such persons. For illustrations, see SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON INTERSTATE COMMERCE, 94TH CONG., 2D SESS., REPORT ON THE ARAB BOYCOTT AND AMERICAN BUSINESS 33-34, 38-39 (Subcomm. Print 1976); *Foreign Investment and Arab Boycott Legislation, Hearings on S. 425, Amend. No. 24 Thereto: S. 953, S. 995, & S. 1303, Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 69-70, 188-89 (1975) [hereinafter cited as

tered open, flagrant religious discrimination if its authors had not been made aware of the public hostility to any such effort. Through a series of underwriting episodes in 1975 in Europe and this country involving Arab capital and religious discrimination, it had become evident to Arab countries that discriminatory policies would backfire.¹⁷

But in a less tangible sense that escapes hard documentation, the boycott was instinct with subtle pressures towards religious discrimination. For example, boycott regulations proscribed transactions with Zionists or Zionist-controlled firms.¹⁸ Such rules inevitably raised questions about the relationship between Zionists and Jews, and about the feasibility of drawing a sharp and administrable distinction. Firms courting petrodollar trade might expediently avoid commercial relations with Jewish lawyers or bankers, or hesitate to appoint Jews to prominent executive positions. Moreover, the visa

Stevenson Hearings]. A survey as of 1976 indicated that of 50,000 transactions involving boycott requests which firms had reported to the Department of Commerce, only 25 involved religious discrimination. *Hearings on Discriminatory Arab Pressure on U.S. Business Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 119 (1976) [hereinafter cited as *Bingham Hearings*]. See also *Hearings on Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton, Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess., ser. 94-95, 21 (1975) [hereinafter cited as *Moss Hearings*]. At times, the State Department succeeded in terminating efforts at religious discrimination that were referred to it by the Commerce Department through diplomatic negotiations with the Arab country involved. See, e.g., N.Y. Times, July 24, 1975, at 3, cols. 2-3.

Indeed, the rarity of internal religious discrimination was demonstrated through the testimony of Maxwell Greenberg, chairman of the National Executive Committee of the Anti-Defamation League of B'nai B'rith. An analysis which he submitted indicated that religious discrimination figured in only 3 of 836 reports filed with the Commerce Department since October 1976, and those three were related primarily to the negative certificate of origin. There were no requests in this sample for information about ownership or control of companies by Jews or whether officers or directors were Jews. See *1977 Senate Hearings*, *supra* note 14, at 240-42.

¹⁷ For accounts of the underwriting episodes, see N.Y. Times, Mar. 4, 1975, at 43, col. 3; *id.*, Feb. 24, 1975, at 39, col. 7. For indications of the growing pressure for action following such episodes, see letters and complaints set forth in *Stevenson Hearings*, *supra* note 16, at 201-77. See President's Statement on Foreign Boycott Practices of Nov. 20, 1975, 11 WEEKLY COMP. OF PRES. DOC. 1305, 1306 (Nov. 24, 1975).

¹⁸ See the provisions in League of Arab Countries, General Secretariate, Head Office for the Boycott of Israel, General Principles for Boycott of Israel, June 1972 (State Department translation of a summary of the boycott rules and the full text of resolutions), reprinted in *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess., pt. 11, 442-76 (1975). The resolutions treating "Zionist Sympathizers" or "Zionism" or corporations that may be characterized as "Zionist sympathizers" appear in *id.* at 453-58 and 466.

policies of countries such as Saudi Arabia went beyond anti-Israeli measures to exclude Jews of any nationality. Those policies had involved our government in the discriminatory selection of Americans for service in that country.¹⁹

A secondary boycott against Israel thus posed a risk of discrimination against a body of American citizens, a risk that would not have been presented by a boycott against a country like Pakistan with no related American population. The principle of non-discrimination had a genuine and not contrived bearing on legislation.

The principle reached beyond religious discrimination to figure within the recurring free-trade arguments against the boycott.²⁰ It is, of course, easy to expose the contradictions in the invocation of that economic objective. Our own regulatory schemes offer telling illustrations of departures from free-trade norms, ranging from tariffs or quotas or price supports to restrictions on monetary or investment flows. Moreover, our specific boycott regulations as well as our general export controls explicitly discriminate among nations.²¹

Still the secondary boycott against Israel embraced other territories with an inclusiveness that this country had rarely attempted.²² For our government to discriminate in trade or investment in our perceived national interest was one matter. For our economy to

¹⁹ In the President's Statement on Foreign Boycott Practices of Nov. 20, 1975, *supra* note 17, President Ford referred to these practices and prohibited federal agencies from considering the exclusionary policies of a host country when making overseas assignments.

²⁰ See, e.g., the remarks of Senator Proxmire objecting to Arab efforts to "dictate" the directions of trade to American firms. "We believe that quality and price should be the ultimate arbiter in the marketplace both in our domestic and foreign commerce." 1977 *Senate Hearings*, *supra* note 14, at 2. "[I]nstead of being fearful of Arab retribution," this country should use all efforts to assure "that all of our trade is conducted in accordance with free market principles." *Id.* at 3. This free-trade rhetoric was joined in by spokesmen for business interests, if only to deplore boycotts in general while urging caution in any restrictive regulation of the Arab boycott. See the statement of the National Association of Manufacturers (NAM), noting the NAM's support of government policy to eliminate international boycotts "which serve to distort market-oriented trade and investment flows." *Id.* at 334. Still diplomacy was the path to be preferred over legislation.

In his comments upon the signing of the antiboycott legislation, President Carter stated that "the issue also goes to the very heart of free trade among all nations." 13 WEEKLY COMP. OF PRES. DOC. 898 (June 27, 1977).

²¹ The legislative bases for our own boycotts and export regulations are principally section 5(b) of the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (1970 & Supp. V 1975), and the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969) (codified at 50 U.S.C. app. §§ 2401-13) (1970 & Supp. V 1975) (expired 1976), as extended and amended by EAA, *supra* note 1. The boycott and export restrictions under this legislation are described in Steiner, *supra* note 11, at 1358-62.

²² Steiner, *supra* note 11, at 1362-70, 1396-97.

express the discriminatory design of foreign governments was another. Moreover, whatever our departures from it, the principle of non-discrimination in trade has remained an attractive ideal. Free-trade arguments in the Congress may have been used instrumentally to cover other motives for attacking the boycott. But their prominence suggests that they carried some weight of their own.

As it merges into free-trade objectives, the non-discrimination principle borders upon the second major principle in the legislative arguments, that of territorial sovereignty.²³ The secondary boycott, a territorially aggressive policy, sought to absorb third-countries into the boycotters' economic warfare against the target country. It reached extraterritorially in an explicit way, leaving upon the third country's territory a trail of questionnaires, certifications and letters of credit with boycott-related conditions. That trail deepened and broadened as annual petrodollar trade soared from millions to billions of dollars. A *de jure* Arab boycott on export of goods, capital or technology to Israel threatened to become *de facto* our export ban as well.

Seen from this second principle, Congress' action can be understood to assert: if any government imposes a systematic boycott scheme upon American industry, that government should be our own.²⁴ As we shall see, after Carter's election, the force of this argument won even the Administration.²⁵

²³ The common border of the two principles is suggested by remarks of Senator Heinz about the secondary boycott. He referred to "the paramount moral issue" as whether this country should comply with foreign discriminatory requests and the secondary boycott. 123 CONG. REC. S.7151 (daily ed. May 5, 1977).

²⁴ The legislative record contains numerous references to foreign interference with this country's sovereignty. See, e.g., remarks of Senator Stevenson (the boycott "intrudes upon American sovereignty") in 1977 *Senate Hearings*, *supra* note 14, at 1; statement by the AFL-CIO Executive Council on the Arab Boycott (the secondary boycott has "put at issue America's willingness to defend its own principles and sovereignty") *id.* at 505. See also REPORT OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, EXPORT ADMINISTRATION AMENDMENTS OF 1977, S. REP. NO. 104, 95th Cong., 1st Sess. (1977) [hereinafter cited as 1977 SENATE REPORT]. Enactment of the antiboycott bill means that "foreign nations would be put on notice that the U.S. Government will not tolerate such interference with its sovereignty." *Id.* at 22. In urging a narrowly drawn exception for unilateral selection of goods or services, the Report notes that this country should not tolerate foreign buyers' telling U.S. vendors whom they can hire for general, unidentifiable goods or services. "Such dictation reaches into the heart of U.S. internal affairs . . ." *Id.* at 23.

²⁵ After his Middle Eastern trip, Secretary Vance stated that the Arabs' strong concern was with our interference in the administration of the primary boycott. "They understood our sensitivity over their secondary boycott practices and our right to regulate, through our laws, the activities of our citizens." 1977 *Senate Hearings*, *supra* note 14, at 437. Risk of loss of trade would be reduced "if the Arabs see the legislation as dealing with the activities of

In their general and abstract form these two principles provided sturdy support for curbs on the secondary boycott. But one should appreciate that the principles took on particular force because of the precise national and political context to which they were applied. We have noted the peculiar pertinence of the non-discrimination principle when a secondary boycott aims at a target country with which a part of the American population is linked by common religion, ethnic character or culture. Moreover, the boycott attempted to absorb American business into a discriminatory scheme against Israel, a country enjoying broad public sympathy as well as one receiving our military and economic aid.²⁶ The boycott could hardly have touched more sensitive national nerves, or avoided the charge of interfering with our territorial sovereignty.

That charge had particular appeal because of a general mood in Congress. Since 1973, rising oil prices and the resulting petrodollars contributed to domestic inflation and related economic problems, and influenced our Middle Eastern policy. The secondary boycott symbolized this new economic force, a force here exerted upon and visible within our national territory. National pride or simply resentment at oil politics can be sensed throughout the long legislative history.²⁷ At least in part, Congress said that petrodollar power had its limits. The United States could still act to assert its territorial sovereignty.

Viewing the two principles in this political context, the arguments for legislation can be seen to involve four key elements: (1) a discriminatory commercial practice; (2) such a practice against a foreign country to which the United States gave critical support and to which a group of citizens was in some manner linked; (3) a practice authored by and serving the purposes of foreign governments; and (4) a practice imposed on American territory and industry by the bait of petrodollars. To these should be added a fifth element:

American firms rather than confronting their own policies and laws." *Id.* at 441.

²⁶ See, e.g., comment of Senator Williams that U.S. firms "have become enforcers of pernicious and illegitimate practices against a close ally, Israel . . ." *Id.* at 3; and remarks of Representative Whalen that Arab officials were showing greater "appreciation of American objections to U.S. companies being used as a tool of un-American foreign policies." 1977 *House Hearings*, *supra* note 14, at 281.

²⁷ See, e.g., remarks of Senator Proxmire ("I do object to the Arab nations using their power to dictate the terms of trade to American firms."), 1977 *Senate Hearings*, *supra* note 14, at 2; and remarks of Senator Williams (cannot allow "the threat of reprisal by the Arabs" to permit compliance by American firms with requirements that "abridge this Nation's sovereign powers"), *id.* at 3.

congressional resentment against the willing complicity of American business in the entire scheme, indeed the assumption by firms of part of the burden of administering the boycott through letters of credit or through furnishing boycott-related information.²⁸

The significance for congressional action of the *combination* of the four major factors becomes the clearer through variations of the historical facts. Had a secondary boycott been instituted, for example, by India against Pakistan, it is doubtful whether a similar legislative attack would have been mounted. Since the amount of trade potentially affected would have been slight, the boycott would not have left a deep mark upon our economy. Fewer and less threatened domestic groups would have gathered energies to inform about the boycott and militate for restrictions. Some complicity of private industry with such a boycott would not have contradicted a basic foreign-policy commitment to the target country.

B. *Opponents of Strict Legislation*

During the Ford Administration and to some extent that of Carter, the executive branch opposed the pending bills. Business was in opposition throughout. As the Executive moved in 1977 towards acceptance of legislation that would be tamed by the two exceptions and other limits, business interests mounted a more systematic and public attack. The most effective of these groups, the Business Roundtable, played the vital role that is discussed in section V of this Article. Here I examine the general position of industrial or business groups and of the Congressmen sympathetic to them.

1. *Predictions of Economic Loss*

Business spokesmen advanced one basic argument consisting of observations of fact and predictions of behavior. It had the following

²⁸ See HOUSE COMM. ON GOV'T OPERATIONS, REPORT ON EFFECTIVENESS OF FEDERAL AGENCIES' ENFORCEMENT OF LAWS AND POLICIES AGAINST COMPLIANCE, BY BANKS AND OTHER U.S. FIRMS, WITH THE ARAB BOYCOTT, H. REP. NO. 1668, 94th Cong., 2d Sess. 5-9 (1976). Chairman Burns of the Federal Reserve Bank stated that "the U.S. bank in a real sense gives effect to the boycott by agreeing to handle a letter of credit that embodies such terms." Letter from Arthur Burns to Representative Benjamin Rosenthal (June 3, 1976), set forth in *Hearings on Effectiveness of Federal Agencies' Enforcement of Laws and Policies Against Compliance, by Banks and Other U.S. Firms, With the Arab Boycott, Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Governmental Operations*, 94th Cong., 2d Sess. 81 (1976). Senator Proxmire observed that the secondary boycott forced U.S. firms to police and enforce the boycott and that banks "play a strong enforcement role." 123 CONG. REC. S7150 (daily ed. May 5, 1977).

elements: (a) With few exceptions, Arabs could purchase elsewhere their present imports from the United States. This country held no monopoly on technology which could block such trade diversion. (b) Arabs will understand antiboycott legislation as an act of political hostility and as an interference with their sovereignty.²⁹ (c) They will retaliate by turning in pique to European or Japanese markets.³⁰ Hence antiboycott legislation "would effectively bar . . . virtually all American companies from pursuing business opportunities" in the Middle East.³¹ (d) The billions of dollars of trade that we stand to lose will mean the loss of hundreds of thousands of jobs, as well as further irritation of our balance-of-payments problems. (e) Particularly at a time when we should "stimulate, not retard" exports,³² antiboycott legislation makes no sense.

Such assertions were caught at their extreme in a political advertisement sponsored by Dresser Industries and published as the final votes on the antiboycott bills approached.³³ In it, an M.I.T. Professor of International Management advised that there were "500,000 jobs we will *not* have in the U.S." if restrictive laws were passed. Surely, "even the most ardent Israeli supporters do not want their activities to be identified with the loss of half a million American jobs." The "anti-Semitic backlash" from such a consequence "could be tragic."

These views found active endorsement from a few Congressmen. Remarks were made in the House that "needless, punitive and dangerous" legislation "would put in jeopardy billions of dollars of national income,"³⁴ or that legislation would "beyond doubt" reduce jobs.³⁵

Congressmen supporting legislation readily conceded that there might be some loss of trade.³⁶ But many legislators viewed the ex-

²⁹ 1977 Senate Hearings, *supra* note 14, at 77-78 (statement of William Needham).

³⁰ Compare the testimony of Secretary of Commerce Morton described in note 56, *infra*, with statements by spokesmen of business associations predicting such trade readjustments, see 1977 Senate Hearings, *supra* note 14, at 78; 1977 House Hearings, *supra* note 14, at 137-38, 151.

³¹ Letter from Winzler & Kelly, Consulting Engineers, to Senator Cranston (Feb. 16, 1977), 1977 Senate Hearings, *supra* note 14, at 100.

³² 1977 Senate Hearings, *supra* note 14, at 151 (statement of Harold Morgan).

³³ Wall St. J., Apr. 14, 1977, at 24-25 (two full pages).

³⁴ 123 CONG. REC. H3274-75 (daily ed. April 20, 1977) (remarks of Representative Michel).

³⁵ *Id.* at H3295 (remarks of Representative Findley). See also Representative Findley's additional views in H. REP. NO. 190, 95TH CONG., 1ST SESS. AT 58 (1977) [hereinafter 1977 HOUSE REPORT]. The legislation would be "[a]t best . . . a serious encumbrance" to United States firms seeking Arab customers.

³⁶ Senator Stevenson noted that legislation "could provide a loss of trade in the Middle

treme claims of the business community with caution, or scorn. The Chairman of the House Committee on International Relations referred to the message sponsored by Dresser Industries as "sheer nonsense and the worst kind of scare tactics."³⁷ Others expressed scepticism over draconian predictions "which go far beyond what the facts would justify."³⁸ Indeed, predictions of trade loss, and the threat from Arab countries which they implicitly carried, may have strengthened in some Congressmen the determination to act. For example, several observed that some trade loss could be a price well paid for vindication of the principles supporting legislation.³⁹

2. *The Problem with Predictions*

Congress' scepticism was well founded. The political context in which business spokesmen offered their dark prophecies was a distinctive one. It had characteristics which pointed towards a discounting of the types of predictions that were made.

In more typical settings, legislators wrestle with the problem of predicting behavioral responses to new legislation. Their estimates of probabilities of one reaction or another will influence decisions about such characteristic measures of the regulatory state as a penal statute imposing a strict sentence, or a tax measure designed to spur business investment or restrain environmental pollution. In reaching decision, legislators will draw upon the reigning theories of caus-

East" but concluded that some loss was worth implementing "the principle of American sovereignty." 1977 *Senate Hearings*, *supra* note 14, at 156. Senator Proxmire, addressing the fears of businessmen of trade diversion, stated that "I don't think we are as helpless as you made us out to be and I disagree with your notion that we just should ignore the moral elements." *Id.* at 160. "I realize that we are perhaps losing some commercial advantage." *Id.* at 161. Representative Hamilton, arguing for legislation containing the basic exceptions, noted that it "tries to disrupt U.S. trade as little as possible and, therefore, hold a minimum to the shift of jobs and sales overseas." 1977 *House Hearings*, *supra* note 14, at 279. Representative Rosenthal observed: "I would be naive if I did not admit some risk" in the legislation. But he noted "several grounds for optimism that any disruption of trade would be neither severe nor long term." 1977 *House Report*, *supra* note 35, at 52.

³⁷ 123 CONG. REC. H3267 (daily ed. April 20, 1977)(remarks of Representative Zablocki).

³⁸ 1977 *House Hearings*, *supra* note 14, at 199(remarks of Representative Solarz). Representative Bingham, noting that AFL-CIO support for the legislation suggested no expectation of a substantial loss of jobs, observed that there was "no basis on which a precise estimate can be made . . ." 123 CONG. REC. H3268 (daily ed. April 20, 1977). Chairman Zablocki of the House Committee on International Relations noted the "judgment of the committee" that "there could be some small job losses." *Id.* at H3267. There appear in the 1977 *Senate Hearings*, *supra* note 14, at 263-272, 16 editorials supporting legislation from leading newspapers throughout the country. Several of these editorials noted the possibility of some adverse economic effect but expressed scepticism about any large trade diversion.

³⁹ 1977 *Senate Hearings*, *supra* note 14, at 156-161.

ation and behavior under which probabilistic judgments must be made, such as the profit motive for business firms.

In these typical legislative settings, predictions must be made about a general behavioral response among a large number of persons or firms—potential lawbreakers among the general public, manufacturing firms and so on. Will all or most or some individuals be dissuaded from criminal conduct, or will corporations revise technology when subject to a charge on pollutants? Experts may testify about the likely effects of the law. But no one prediction and no one assertion of an intended reaction will be taken as authoritative or decisive. No one person or firm or cohesive group has the power to determine, and thus authoritatively to predict, the general response to proposed legislation. That power is spread among many unrelated social actors.

Note the contrasting structure for prediction in the setting of the boycott. One critical group of actors figures in the debates: the Arab governments. Although that "group" was not before the Congress and not subject to the proposed legislation, its reaction *could* determine the legislation's effects. The Arab governments made their views known through diplomatic channels, and through occasional public comments of officials or spokesmen—such as comments threatening trade diversion which issued from the Central Boycott Office of the Arab League.⁴⁰

In this sense, the legislative setting assumed some of the character of bilateral negotiations. Two groups or institutions—Arab governments and the Congress—were involved in an indirect form of discourse or bargaining. The "parties" were obviously attentive to each other's words and actions.

Within this bilateral structure, statements of intended reaction inevitably served an instrumental purpose. Predictions of trade diversions assumed the character of threat. The threat sought to impress upon the Congress its responsibility for loss of trade if restrictive legislation were enacted.⁴¹ It had a similar purpose to the use

⁴⁰ Reports of reactions of Arab officials to the anti-boycott bills, including suggestions by them that stringent measures might lead to some substitution of European or Japanese markets for American markets, appeared in the press. See, e.g., *Christian Science Monitor*, Jan. 7, 1976, at 5, col. 1; *id.*, Jan. 6, 1976, at 3, col. 2; *N.Y. Times*, Nov. 17, 1976, § D, at 11, col. 1; *id.*, Apr. 12, 1976, at 7, col. 1; *Wall St. J.*, June 25, 1976, at 1, col. 6.

⁴¹ T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960), develops a model in chapters II and V of bargaining in which parties interpret each other's moves and "in which each party is guided mainly by his expectations of what the other will accept." *Id.* at 21. The author distinguishes among various strategies, such as a party's use of bluff or making of a firm commitment to

of public commitments or threats by domestic groups, small in number but large in economic power, which are the targets and opponents of proposed regulation.⁴² That is, this "bilateral" structure of discourse and bargaining can characterize entirely domestic legislative battles.

Congress could not sensibly take such statements at face value. They had to be perceived as strategic, as a bargaining weapon. Indeed, the public statements reported in the press or in the legislative record hardly amounted to an Arab commitment to divert trade to countries which had not legislated against the boycott.⁴³ Such statements appeared in a somewhat random manner. They issued from persons at different levels of authority, and from several but not all Arab countries. The statements themselves were sometimes qualified.

These facts hardly surprise. An explicit and unqualified threat to reallocate billions of dollars of trade if legislation touched the secondary boycott would have been astonishing—risky in terms of the reaction it would induce, engaging national honor, expending political capital. Arab reactions were ultimately affected by the terms of the legislation. Firm threats could hardly have been shaped to meet every possible contingency.

Moreover, a full acceptance of the extreme Arab assertions did not fit with recent history. In assessing the degree of risk present, Congress was entitled to take into account objective historical factors, some of which were extrinsic to the boycott problem. For example, Arab governments in the past had blinked at boycott violations when it was in their interest to do so.⁴⁴ Neither Arabs nor Israelis contended that the boycott had, or was likely to have, a serious influence upon Middle East power politics. Moreover, it was diffi-

action. Commitment shades into threat, which is "designed to impress on the other the automatic consequence of his act." *Id.* at 35. "While the commitment fixes one's course of action, the threat fixes a course of reaction, of response to the other player." *Id.* at 124. Such game or bargaining theory has some suggestiveness for the different, legislative context of the boycott problem.

⁴² See, e.g., Greco, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 1 ENVIRONMENTAL AFF. 384 (1971), for an account of legislative battles in which leading manufacturers asserted that they could not meet proposed automobile emission standards, and that lower production and fewer jobs would follow from legislation. Compare threats of union members that they would not comply with a Taft-Hartley injunction under consideration by the President. N.Y. Times, Mar. 7, 1978, §A at 1, col. 3.

⁴³ See note 40 *supra*.

⁴⁴ For examples, see Stern, *On and Off the Arabs' List*, NEW REPUBLIC, Mar. 27, 1976, at 7, 9, 10; Guzzardi, *That Curious Barrier on the Arab Frontiers*, FORTUNE, July 1975, at 82, 168.

cult to believe that any but the most uncompromising statute, one attacking the primary as well as secondary boycott, would have induced drastic action when Arab governments had long accepted this country's military and economic support of Israel. The political and economic interdependence between many Arab countries and the United States, rather than an imagined one-way dependence of this country on petrodollars and oil, offered further assurance against severe readjustments.

In a sense, business spokesmen stood before the Congress as representatives of the Arab world, absorbing its threats of trade diversion and converting them into business' firm predictions. As a consequence, the Arab governments never were required to go on the line about their reactions. Business did so for them.

It was indeed in business' interest to take the Arab statements at face value, and to employ them to forestall legislation. Such a strategy minimized any risk of loss of export sales. If it succeeded in blocking legislation, business continued as usual. If not, firms would at least be able to prove their adamant opposition to legislation. In this sense, the harsh prophecies may have served instrumental purposes not only towards Congress but towards Arab countries as well.

3. *Other Grounds for Opposition*

The opponents did not speak solely to trade losses. Other themes appeared. For example, the argument was advanced that fairness should lead this country to refrain from regulation, since our boycott policies imposed on others just as the Arab boycott imposed upon our territory. Evenhandedness pointed towards our acceptance of that imposition.⁴⁵ Statutory regulation should not go beyond internal religious discrimination.

This argument, as I have tried elsewhere to demonstrate, had a certain plausibility.⁴⁶ But it ignored distinctions between our basic boycotts and the Arab secondary boycott. Moreover, it tended to confuse the legality of a boycott with a seeming duty of a third country to acquiesce in its extraterritorial reach.⁴⁷

⁴⁵ See, e.g., *Bingham Hearings*, *supra* note 16, at 100, 105, 134-35, 223-30; comments of Vice-President Rockefeller appearing in *San Francisco Jewish Bull.*, May 14, 1976, at 1, 15; comments of Secretary of Treasury Simon in *Statements Before the House Comm. on International Relations*, in *Dep't of Treasury News Release*, June 9, 1976, at 5; statement of William Needham, vice president of Black & Veatch International, Inc., in *1977 Senate Hearings*, *supra* note 14, at 77.

⁴⁶ Steiner, *supra* note 11, at 1396-97.

⁴⁷ *Id.* at 1397-1402.

Still the argument of reciprocity influenced the final legislation, by making Congressmen more sensitive to the proper extraterritorial reach of our response to the secondary boycott. Both the Administration and Congress came to distinguish sharply between the primary and secondary boycotts, as well as between conduct related to the secondary boycott which was dominantly within this or within a foreign country.⁴⁸ Such distinctions were vital in formulating the exceptions which figure in the present regulatory scheme.⁴⁹

Finally, some business spokesmen raised the underlying question of the proper directions for this country's Middle Eastern policy. At its bluntest, that theme led to assertions that antiboycott legislation would be seen by Arabs as but "another indication" of the "imbalance" of our foreign policy.⁵⁰ The battles over this legislation inevitably raised the larger issues of the Arab-Israeli conflict. The occasional surfacing of such issues suggested the degree to which general attitudes towards Israel may have moulded many legislators' positions from the start.

IV. EXECUTIVE POLICY AND PRESIDENTIAL ELECTIONS

Prior to 1975, executive departments made at best a formal bow to the antiboycott statement of policy passed by Congress a decade earlier and restated in section 3(5) of the Export Administration Act of 1969.⁵¹ That section was predictably of pale interest to business firms. But it did not even serve to block the Commerce Department's distribution to American firms of trade bids from Arab countries which included boycott-related requirements. Indeed the Department added its advice that firms were not "legally" barred by section 3(5) from compliance with those requirements.⁵² If the Government treated an official policy statement so casually, firms were unlikely to do otherwise.

⁴⁸ See, e.g., 123 CONG. REC. S7147 (daily ed. May 5, 1977)(comments of Senator Stevenson); *id.* at S7149 (comments of Senator Heinz); 1977 *Senate Report*, *supra* note 24, at 21; 1977 *Senate Hearings*, *supra* note 14, at 427-39 (comments of Secretary of State Vance).

⁴⁹ See, e.g., the description of the essential provisions in 43 Fed. Reg. 3508-12 (1978).

⁵⁰ Statement of William Needham, *supra* note 45, at 78.

⁵¹ Pub. L. No. 91-184, § 3(5), 83 Stat. 841 (1969)(expired Sept. 1976). Section 3(5) stated that it was this country's policy "to oppose . . . boycotts . . . imposed by foreign countries against other countries friendly to the United States, and . . . to encourage . . . domestic [export] concerns . . . to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting [such] boycotts"

⁵² See *Moss Hearings*, *supra* note 16, at 38-40, 154-56.

The underwriting episodes in 1975 in Europe and this country to which I earlier referred,⁵³ as well as fears of a more potent boycott because of accumulating petrodollars, led to greater pressure upon President Ford from Congress and the Jewish agencies. The President took or ordered remedial action with respect to explicit governmental complicity in the boycott and the risk of internal religious discrimination.⁵⁴ But federal policy stopped short of prohibiting compliance with the secondary boycott.

Acute differences between Congress and executive spokesmen characterized the period 1975-1976. As sentiment in the 94th Congress moved towards strong legislation, the executive departments concerned with foreign affairs or commerce viewed the leading bills as something between an embarrassment and a menace. In a general sense, their position reflected the traditional executive view that delicate foreign affairs issues are best left to the Executive. Congress, whether swayed by domestic interest groups or noble aspirations, is more apt to muddle than to achieve a sensible solution. Foreign policy requires coherence in planning and subtlety in execution. A new statute, attended by headlines and acerbic rhetoric, would be exactly the wrong path.

In the immediate context, antiboycott legislation was said to burden our Middle Eastern policy. Part of the larger Arab-Israeli conflict, the boycott was not a subject fit for special regulation. The hostility of Arabs that was certain to be spurred by strict legislation would frustrate diplomatic initiatives to alleviate the boycott. It would also impair our ability to persuade the contending nations towards a larger settlement.⁵⁵

Petrodollars loomed large before the executive spokesmen. Billions of dollars of Arab trade and hundreds of thousands of jobs were there to be gained—or, it was repeatedly said, lost.⁵⁶ The stock

⁵³ See note 17 *supra*.

⁵⁴ See President's Statement on Foreign Boycott Practices of Nov. 20, 1975, 11 WEEKLY COMP. OF PRES. DOC. 1305-1306 (Nov. 24; 1975).

⁵⁵ For testimony or statements of executive officials which advanced these arguments, see *Stevenson Hearings*, *supra* note 16, at 2-9, 19-23, 48-50, 70-80; *Bingham Hearings*, *supra* note 16, at 71-86, 94-103, 118-121.

⁵⁶ Secretary of Commerce Morton expressed the administration view that Arabs were not dependent upon the United States for goods or services and could turn to other markets. If legislation barred boycott compliance by United States firms, "[m]ost of the judgments we have in the Department would indicate that we would lose the business." *Moss Hearings*, *supra* note 16, at 24. Under Secretary of Commerce Baker stressed that annual Arab trade with the United States was estimated to exceed \$10 billion by 1980, and that each billion

market, the specialized markets for government debt securities, and stability of the dollar would be threatened if there were a retaliatory withdrawal of Arab capital, or a shift from Arab holdings of dollar reserves to other currencies.

This reluctance to forbid compliance with the secondary boycott, coupled with a recognition of the need to strengthen antidiscrimination and reporting measures, constituted the Ford Administration's boycott policy until its end. Executive officials asserted that all problems could be met through administrative regulations under existing statutes, through adjudication under the antitrust laws and, most importantly, through quiet diplomacy. It followed that the Administration opposed the two leading candidates for general antiboycott legislation, the Stevenson and Bingham-Rosenthal bills. Surely the Administration was complicit in the maneuvers in the closing days of the 94th Congress by which the convening of a conference committee, the path towards a resolution of differences between the Senate and House bills, was blocked.⁵⁷

In one sense, the Ford Administration succeeded in its goal of avoiding affront to the Arab governments. It forestalled legislation. But in fact its strategy towards Congress was strikingly inept. The officials of the Commerce, State and Treasury Departments simply failed to sense the breadth and intensity of congressional support for some action—whether that support stemmed from effective lobbying by the Jewish agencies, from general sympathy towards Israel, or from the independent power of the arguments for legislation.

Had the Administration perceived the inevitable trend, it would have been wise to have extended support to a weak form of regulation. The Stevenson bill, for example, was not apt to disturb foreign policy. Such a position might have won the support of many in Congress who wished to do something, but not to risk political friction or loss of trade.

The Administration's unyielding hostility to *any* measures reaching beyond religious discrimination served instead to polarize the political process. The choice perceived by many Congressmen was

dollars of exports was thought to create 40,000-70,000 jobs. *Bingham Hearings*, *supra* note 16, at 120.

⁵⁷ Several senators blocked the appointment of Senate conferees to meet with House conferees. To advocates of the antiboycott bills, the link between such senators and the administration was obvious. See 122 CONG. REC. S17594-95 (daily ed. Oct. 1, 1976) (comments of Senator Proxmire); *id.* at S17595 (comments of Senator Stevenson); and *id.* at H12313 (comments of Representative Bingham).

“all or nothing.” In the House they opted for “all” by voting 318-63 for the Bingham-Rosenthal bill.⁵⁸ Indeed, the “phantom” conference committee, that met after a formal convening of the committee was blocked, did produce a “conference” bill that was very close to the Bingham-Rosenthal bill.⁵⁹ The stage was set for strong action by the next Congress.

Not until the electoral campaign was underway did President Ford’s position appear to change. Campaign pressures, intensified by Carter’s effective use of the boycott issue with Jewish groups, worked their influence. During a televised Carter-Ford debate, the President declared his commitment to legislation “which would take strong and effective action against those who participate or cooperate with the Arab boycott.”⁶⁰ Friends and foes of the legislative proposals were equally astounded.

Carter, confronting doubt within the American Jewish community about his empathy for Jewish concerns or Israeli problems, gave the boycott issue a certain prominence in his campaign. He attacked the Ford Administration’s attitude and promised strict legislation.⁶¹ In so doing, Carter emphasized the issue of internal religious discrimination.⁶² That issue was attractive. It aroused strong emotions and spoke to shared moral concerns. Promising action to counter religious discrimination was likely to irritate few. Of course in this respect Carter simply adopted the precampaign approach of the Ford Administration.

⁵⁸ 122 CONG. REC. H10864 (daily ed. Sept. 22, 1976).

⁵⁹ The revised bill as approved by conferees at their informal meeting was introduced into the Congressional Record by Representative Bingham. 122 CONG. REC. H12313-15 (daily ed. Oct. 1, 1976).

⁶⁰ N.Y. Times, Oct. 7, 1976, §A, at 38, col. 1.

⁶¹ See, e.g., N.Y. Times, Oct. 1, 1976, § A, at 19, col. 1; N.Y. Times, Oct. 20, 1976, at 28, col. 1.

⁶² In the second Carter-Ford debate on October 6, 1976, Carter said he would “do everything I can as President to stop the boycott It’s not a matter of diplomacy or trade with me. It’s a matter of morality When we have a strong President who will protect the integrity of our Constitution and Bill of Rights and protect people in this country who happen to be Jews—it may later be Catholics; it may later be Baptists who are threatened by a foreign country, but we ought to stand staunch.” Referring to the boycott of businesses “because they have American Jews as owners or directors,” Carter stated that this was the first occasion in our history “where we’ve let a foreign country circumvent or change our Bill of Rights.” N.Y. Times, Oct. 7, 1976, at 36, col. 1. This emphasis remained to the end. Upon signing the antiboycott legislation, the President said that it did not threaten the sovereign right of any foreign nation to control its own commerce. “The bill seeks instead to end the divisive effects on American life of foreign boycotts aimed at Jewish members of our society.” 13 WEEKLY COMP. OF PRES. DOC. 898 (June 27, 1977).

But an important change had occurred. Carter was committed to *some* type of legislation. Whether that legislation would tend towards the Senate (weak) or House (strong) bills of the 94th Congress remained ambiguous, although some assurances given by Carter pointed towards curbs on the secondary boycott. But the issues and assurances were blurred.

Whatever its attractiveness as a campaign strategy, the stress upon religious discrimination and the corresponding downplay of other vexing questions about the secondary boycott had their serious consequences. As the cautious content of the Carter Administration's program became known early in 1977, charges of the compromise of earlier commitments were bound to and did arise.

That program stopped far shy of measures like the Bingham-Rosenthal bill. It was as if Carter as President first realized the complexity of these issues. Evidently pressures were felt within the White House both from business interests and Arab governments. The Secretary of State's early tour of Arab capitals had its influence. All these pressures heightened the Administration's sensitivity to legislation's potential influence upon Middle Eastern oil politics, petrodollar investment in United States securities, and petrodollar trade. The bold assurances of the campaign became the muted commitments of early 1977.

In part the direction of the Administration was traceable to the new vigor of and the positions struck by the leading interest groups. As long as the Ford Administration had been using its political capital to attack all serious proposals before Congress, business interests apparently concluded that there was no need to mobilize. But Carter's campaign and election, seen against the bill which had almost passed the 94th Congress, signified that business could no longer remain at an observer's distance. Obviously something would happen. Business would now seek to influence just what did.

As a consequence, some business associations moved from dogmatic opposition to any statute towards advocacy of limited regulation, and thereby became a more effective force and influence upon Administration strategy. By contrast, the Jewish agencies that had been so close to celebrating enactment of the Bingham-Rosenthal bill were content to wait and see how the Carter Administration honored its campaign commitments. They saw no political need to retreat from advocating a strong 1976-style bill.

Secretary of State Vance and other executive officials developed the new program in testimony early in 1977 before congressional

committees. It amounted to a guarded attack upon the secondary boycott.⁶³ Such boycotts could use this country's commerce "to harm third countries with whom we are friends."⁶⁴ Through executive-congressional cooperation, "we can make progress on these issues without seriously impairing opportunities for foreign trade or inhibiting our diplomacy in the Middle East. . . ."⁶⁵ The legislation had to be scrupulously drawn, to guard against overreach and undue offence to Arab sensibilities. Although Arab governments would not be "happy" with it, a statute along the lines developed by Vance "would be understood" by them.⁶⁶ An explanation "emphasizing that U.S. legislation deals—as is entirely appropriate—with U.S. commerce and the activities of U.S. persons will be understood by Arab leaders."⁶⁷ Such remarks, following the Middle Eastern trip of the Secretary, suggested that this government was at last using diplomacy to justify some form of antiboycott legislation to leading Arab governments. The effectiveness of this diplomacy was evidenced by such governments' grudging concessions during this period—for example, their willingness to dispense with a "negative" certificate of origin on imported goods, and to accept the normal affirmative certificate to enforce their primary boycott.

The proposal put to the Congress by Vance and Secretary of Commerce Kreps was for a new direction—a *via media*—a fresh statute drafted by the Executive and congressional committees that would distinguish between primary and secondary boycotts and regulate the latter, but only selectively.⁶⁸ Because of their blurring of this distinction and their blanket prohibition of any compliance with the secondary boycott, the strong bills then before both Senate and House were, in Vance's view, "unhelpful" to peace efforts.⁶⁹ They could adversely affect oil prices, trade and petrodollar investment.

But it was made clear to Vance that discussion would have to proceed within the framework of those strong bills.⁷⁰ The commit-

⁶³ Relevant testimony and a prepared statement of Secretary Vance are set forth in 1977 *House Hearings*, *supra* note 14, at 4-32. A prepared statement of and letter from Secretary of Commerce Kreps are set forth in *id.* at 230, 319. Secretary Vance's testimony on the Senate side of these matters appears in 1977 *Senate Hearings*, *supra* note 14, at 427-42.

⁶⁴ 1977 *Senate Hearings*, *supra* note 14, at 427.

⁶⁵ 1977 *House Hearings*, *supra* note 14, at 4.

⁶⁶ *Id.* at 32.

⁶⁷ 1977 *Senate Hearings*, *supra* note 14, at 429.

⁶⁸ 1977 *House Hearings*, *supra* note 14, at 319; 1977 *Senate Hearings*, *supra* note 14, at 437.

⁶⁹ 1977 *Senate Hearings*, *supra* note 14, at 438-39.

⁷⁰ See Maslow, note 13 *supra*, at 11, 22.

tees would not start fresh with the new Administration as partner. Given this barrier to its preferred approach, the Administration urged the writing into the pending bills of provisions which business interests were then advocating: broad exceptions for unilateral selection of goods or services, and for local compliance with host-country laws; limited extraterritorial reach; preemption with respect to state laws; limited reporting.⁷¹

The Administration's advocacy of these changes signified the formation of a powerful coalition to tame the legislative proposals inherited from the 94th Congress. Our foreign affairs and commerce agencies together with "responsible" business spokesmen were more or less united. A major battle was pending. Fearing the threat of such a battle within Congress and before the public between the Jewish agencies and business leaders, a battle into which the President might well be drawn, the White House searched for a quieter path towards resolving the differences. It put its weight behind private negotiations between the Business Roundtable and the three Jewish agencies. The Business Roundtable would stand informally as a surrogate for the executive departments. It would speak with the support of the White House, which itself could remain conveniently quiet.

This post-campaign strategy of President Carter was an important force in his achieving legislation more moderate than that before the 94th Congress. Adherence to the Executive's earlier dogmatic opposition might have led to a tougher statute. The paradox was that only a willingness to accept some restraints on the secondary boycott enabled the Administration to weaken the bills before the Congress.

One also senses that only its awareness of the powerful congressional base for legislation explains the Administration's support for curbs on participation in the secondary boycott. Its basic concerns were elsewhere, with foreign policy, oil and trade. That President Carter would have risked setbacks on such matters by urging a strong statute to satisfy claims of the American Jewish community appears doubtful. As with Ford, the prudent path was to speak vigorously to the moral issues and to act to the minimum necessary.

But, its hand now forced by Congress, the Administration joined the fight together with business for important exceptions and limits to the bills. That strategy succeeded on various grounds. Most im-

⁷¹ 1977 House Hearings, *supra* note 14, at 319.

portant, it demonstrated to Arabs a certain evenhandedness in policy. The present law meets the full demands of neither Jewish groups nor multinational corporations. Moreover, we have seen that it can be viewed, both in its restraints and in its exceptions, as expressing the two basic principles. And those principles can be viewed as transcending the immediate interests of the contending parties. To that extent, the antiboycott legislation need not bear a pro-Israel or anti-Arab message. It sheds some of its politically divisive character.

V. BARGAINING BETWEEN PRIVATE INTEREST GROUPS

Numerous business associations ranging from petroleum-equipment exporters to the Chamber of Commerce testified before the Congress. Their hostility towards any regulation and their exaggeration of risks of trade loss diminished their effectiveness. At the same time another business association that had made only brief and low-key appearances before Congress powerfully influenced the legislation.

The Business Roundtable, formed in 1972 to "develop positions that reflect sound economic and social principles,"⁷² consists of the chief executives of about 180 companies which figure among the nation's 500 largest. Its access to and influence upon the White House has been on the rise, partly because its membership includes executives known by the President.⁷³ Expressing opinions, and often consulted, on legislative matters affecting business such as consumer-protection legislation, the Business Roundtable has been effective in developing, publicizing, and gaining support for positions acceptable to its constituents.

Carter's campaign assurances, coupled with the strong bills that were certain to re-emerge in the 95th Congress, meant that legislation was inevitable. Responding to this political reality, the Business Roundtable formed a task force in January 1977 to consider the antiboycott bills. It initially invited the Anti-Defamation League to form a similar committee for joint meetings. Eventually the three Jewish agencies joined in this arrangement.

⁷² "Foreign Boycott Regulations"—Submission of the Business Roundtable Task Force to the U.S. Department of Commerce in Connection with Implementation of Title II of the Export Administration Amendments of 1977, July 18, 1977, at i.

⁷³ For a recent account of the growing influence upon the President of certain interest groups, including the Business Roundtable, see Clymer, *Like Carter, Potomac Power is Ambiguous*, N.Y. Times, Jan. 8, 1978, §12, at 26, col. 1.

A group of lawyers from the Business Roundtable and the agencies together wrote a set of principles to guide the Congress.⁷⁴ Stated at a general level, these principles led to only transient agreement between the two groups. The Jewish agencies sought to construe narrowly those portions covering exceptions to prohibitions—particularly exceptions involving unilateral selection of goods and compliance with local laws—and to construe broadly the provisions for extraterritorial reach to foreign subsidiaries. The Business Roundtable naturally went in the opposite direction.⁷⁵ The groups fell apart.

Under public and persistent encouragement from the White House and Congressmen, the two groups resumed negotiations. Eventually they agreed upon a draft of amendments to a pending bill which covered these contentious matters.⁷⁶ Those amendments of course relaxed the categorical prohibitions of the earlier bills. Where the two groups still differed, vague terms were used. Each group could hope that the statutory language would be interpreted in its favor in the regulations to be issued by the Commerce Department.

In these negotiations and in its public remarks, the Business Roundtable appeared to stand for the "responsible" middle position. In fact, its views moved during the negotiations towards further recognition of the Jewish agencies' concerns. That move and the public sense of the Business Roundtable as a "responsible" group encouraged the Jewish agencies towards a compromise.

For several reasons, compromise came to make more sense to the Jewish agencies than an outright battle in Congress. Just where the lines were drawn on the exceptions or other statutory terms, had had an evident significance, but not of a cosmic order. Many crucial points had been won since 1975. To fight to push the lines back to those of the earlier bills might have expended a political capital with the Carter Administration, Congress, and big business that was better reserved for more serious matters. Moreover, the fight

⁷⁴ The Joint Statement of Principles re Foreign Boycott Legislation is set forth in 1977 *Senate Hearings*, *supra* note 14, at 476.

⁷⁵ See letter from Irving Shapiro, chairman of the Business Roundtable, to Chairman Zablocki of the House Comm. on International Relations (Mar. 10, 1977) *reprinted in* 1977 *House Hearings*, *supra* note 14, at 328.

⁷⁶ Commenting on the draft, President Carter stated: "I am pleased to announce that an agreement has been reached . . . on legislative language for the anti-foreign boycott bill presently being considered by the Senate, and that I can strongly recommend congressional approval of that language." 13 WEEKLY COMP. OF PRES. DOC. 650 (May 19, 1977).

might well have been lost. No longer was Congress given an "all or nothing" choice. The Administration and the Business Roundtable pointed towards the reasonable—the *via media*.

It was not unusual for private interest groups to compose their differences and submit joint legislative proposals. It was at least unusual for the President and Congressmen to urge such efforts. It was remarkable that the amendments drafted by the two groups were adopted *verbatim* by the Congress, indeed by a 90-1 vote when introduced on the floor of the Senate.⁷⁷

It is easy to see in this innovative bargaining a reflection and strengthening of the trend towards more structured interest-group politics. It is also possible to see a hint of increased governmental delegation to private groups of the task of reaching agreement on legislative programs that would then be enacted by Congress.⁷⁸

Such delegation would amount to a trend towards mixed private-public lawmaking that combined elements of traditional democratic and of corporative structures of government. It would express a more formal, official recognition of the claims and powers of interest

⁷⁷ 123 CONG. REC. S7189 (daily ed. May 5, 1977). The final House vote on the bill was 306-41, with 86 not voting. 123 CONG. REC. H5706 (daily ed. June 10, 1977). In the Senate floor debate at the time of adoption of the amendments, a number of senators stated that they would have preferred a stricter law. Senator Bayh, after expressing that view, noted that the Jewish agencies and the Business Roundtable had "developed a common position on potentially divisive issues." *Id.* at S7188. U.S. NEWS & WORLD REP., June 20, 1977, at 64, stated that "observers could recall no previous instance of Congress and the White House openly inviting such outsiders, in effect, to write their own statute."

A vigorous political process continued through the six-month period during which the preliminary and formal regulations appeared. The Business Roundtable, Jewish agencies, and numerous other groups filed suggestions and criticisms with the Department of Commerce in response to the preliminary regulations. Congressmen themselves expressed their keen interest and views to the Department. See *Hearings on Department of Commerce's Proposed Anti-Boycott Enforcement and Regulation Plans Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. (1977), and the letters reproduced therein at 89-100 to the Secretary of Commerce from a number of Senators and Representatives. Ultimately the Jewish agencies, although noting some disappointments and issuing some *caveats* about enforcement, could express "satisfaction with the thrust" of the regulations. AMERICAN JEWISH CONGRESS, 2 BOYCOTT REPORT No. 2, at 2 (1978). And the chairman of the Business Roundtable could express the general business reaction as: "I can live with it." *Id.*

⁷⁸ In his remarks at the time of signing the antiboycott legislation, President Carter complimented the members of Congress whose "hard work" was so important to the legislation. He added: "And it owes just as much to the patient perseverance of the Business Roundtable, the [three Jewish agencies], as well as other groups This cooperative effort between the business community, the Jewish leaders, the Congress, and the executive branch can serve as a model for what can be accomplished in even more difficult areas, when reasonable people agree to sit down together in good will and good faith." 13 WEEKLY COMP. OF PRES. DOC. 898-99 (June 27, 1977).

groups than has been customary during these recent decades of pluralist politics. It would rest partly on the assumption that the public welfare is best attained through the compromises reached outside the halls of Congress by the private interests involved. Congress would simply touch the outcome of private bargaining with the wand of public authority. The model of the labor contract would expand through this informal pattern of delegation to embrace larger areas of political life.

The negotiated agreements between the Business Roundtable and the Jewish agencies and their ratification by Congress may indeed serve as a model for other informal delegations of the "legislative" power. But the context in which this bargaining occurred suggests a more conservative interpretation. Antiboycott bills had been before the Congress for several years. It was unmistakable as the 95th Congress convened that some form of strong rather than nominal bill would pass. The questions open—the exceptions and extent of extraterritorial reach—were important in themselves. But the precise line of compromise over them was of marginal significance in relation to the undeniable achievements of the statute as a whole.

It was in this structured setting, one in which the critical legislative decisions had been taken, that Congress and the White House sought a less public path towards the final line-drawing. An obvious and basic difference exists between such a sequence of events and an invitation from government to contesting groups to plan from the start and to draft a bill which government would then convert into law.

VI. RETROSPECT AND PROSPECT

The new law takes a large and necessary step towards checking secondary boycotts. Some check there had to be, for the inner logic of the Arab boycott suggested no stopping point. Quite naturally, the secondary boycott will tend to expand its coverage and increase its effectiveness where national opposition is muted. It will stop at, and not before, a firm legal barrier.

The alternative to such legislation for the United States was to act only against the religious discrimination upon which this boycott will always border, and to acquiesce in our absorbing a systematic pattern of trade discrimination. This was not an acceptable alternative. Among other consequences for self-respect or national well being, it would have confirmed the deepest fears of the American Jewish community that oil governs, and that concerns of Ameri-

can Jews, as well as Israel's integrity, would be surrendered to petrodollar politics.

The legislation responds to the critical arguments based on the principles of non-discrimination and territorial sovereignty. It does so without the exacerbation which had been forecast. In part, this was so because the disputants came to see each other's legitimate concerns. In part, both advocates and opponents could come to see the principle of territorial sovereignty as a mediating or common principle above all disputants, at once justifying legislative restrictions and pointing towards their boundaries.

The regulatory scheme now draws basically a territorial line in prohibiting such domestic conduct as religious discrimination, the supply of information, or discriminatory commercial decisions responsive to the boycott. The exceptions and the limits on extraterritorial reach permit substantial boycott-directed conduct of United States subsidiaries abroad, such as their agreement to comply with the boycott with respect to their foreign production or conduct, or with respect to their imports into Arab countries for their own use.⁷⁹

Occasionally these territorial lines are blurred. The prohibitions reach foreign subsidiaries of American firms on transactions bearing defined relationships to the United States.⁸⁰ On the other hand, domestic firms can supply affirmative certificates of origin that will be used for boycott purposes, and can comply with the unilateral selection by a purchaser in an Arab country of, for example, trademarked components of products, even if aware that the selection was responsive to the boycott.⁸¹ To that limited degree, the extended secondary (tertiary) boycott continues to be administered by American firms on American territory as they contract with other American suppliers within foreign unilateral selections.

The effect of the legislation upon the prosecution of the boycott remains problematic. Of course the primary boycott will continue as long as Arab countries so desire. No American legislation could effectively curb it, or indeed should seek to. Moreover, there are inherent limits to legislation's ability to contain the secondary boycott. Even the strong Bingham-Rosenthal bill of the 94th Congress confronted these limits. Arab governments can continue to maintain blacklists and select American firms as their pocketbook or

⁷⁹ EAR §§ 369.1(d) and 369.3 (f-2), 43 Fed. Reg. 3514, 3533 (1978).

⁸⁰ See, e.g., EAR § 369.1(d)(8,9), 43 Fed. Reg. 3514 (1978).

⁸¹ EAR § 369.3(c), 43 Fed. Reg. 3526-30 (1978).

politics may recommend.

What the legislation achieves is more modest. It erases, or in some respects only dulls, the secondary boycott's mark on our domestic life. It should end the explicit absorption of American business into the boycott's administration. But here too there are limits. Informal cooperation by American firms, principally the large multinationals to which the statutory exceptions and limits are particularly relevant, will be difficult to detect and regulate. The integrity and techniques of enforcement by the Commerce Department will be of importance—including the meaning and application given the legislation's evasion clause.⁸²

That the legislation will seriously disturb Arab trade with the United States appears doubtful. Effective diplomacy and the statutory exceptions sharply reduced whatever risk there may have been of large readjustments of Arab purchases.

In any event, the causal influences upon trading patterns are so difficult to unravel that a precise determination of the legislation's influence is unlikely. Changing trade or investment will reflect the influence of factors as varied as inflationary price rises, interest rates and stock market performance, views about a given currency's strength, or the desire to concentrate or diversify purchases for general political reasons. To the present, such information about Arab trade or investment as has been made public suggests at most a mild impact of the legislation.⁸³

Nor is the legislation likely to influence Middle Eastern political issues. Within the larger picture, the boycott represents a minor scene. It is more reflection than cause of political tensions. Whatever its economic effectiveness, it will doubtless survive in some form as long as Israel and the Arab countries see themselves as antagonists. It will fade as prospects for peace brighten, and disappear into a general settlement. Let us hope for the day!

⁸² EAA sec. 201, § 4A(6).

⁸³ In Curry, *Anti-Boycott Laws Unlikely to Affect Mideast Trade Greatly*, Wash. Post, Jan. 18, 1978, § C, at 7, cols. 1-5, sources in government and industry are reported as stating that "no one expects any significant impact on the billions of dollars" of Mideast trade. A Commerce Department "expert" is quoted as stating that "a number of [Arab] countries have indicated they will accept such arrangements." The article notes some indications of lost sales that may be boycott-related. A report in the Wall St. J., Aug. 1, 1977, at 6, col. 3, stated that Iraq had retaliated against the antiboycott legislation by advising its state trading agencies to avoid United States products if suitable products were available elsewhere. An article by Crittenden, *Arabs' Investments in U.S. Slackening*, N.Y. Times, Nov. 25, 1977, at 1, col. 6, analyzes a number of factors relevant to the decline, such as stock prices or interest rates and weakness of the dollar, but does not mention antiboycott legislation.